



Citation: *NH v Canada Employment Insurance Commission*, 2023 SST 2031

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: N. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (577480) dated April 14, 2023
(issued by Service Canada)

Tribunal member: Jean Yves Bastien

Type of hearing: Videoconference

Hearing date: September 8, 2023

Hearing participants: Appellant

Decision date: October 25, 2023

File number: GE-23-1536

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost his job because of misconduct (in other words, because he did things that caused him to lose his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant was first suspended on December 1, 2022, and then he lost his job on December 7, 2022. The Commission says that he was let go due to his inappropriate and rude discussions with customers that occurred multiple times.²

[4] The Appellant worked in the employer's Customer Support Centre, (a call-centre) as a "Resolution Generalist" (after-sales service, customer help line). His duties were mostly "customer facing". He was essentially the "voice of the company". But he repeatedly demonstrated unacceptable behaviour toward clients.

[5] All interactions at the employer's Customer Support Centre are recorded for possible review, and customers are invited to submit online reviews of their experience. In addition, sophisticated call-center software passively monitors interactions from which a number of objective performance metrics are produced.

[6] The Appellant's conduct during one particular client interaction on November 28, 2022, led to an immediate intervention by the employer. The Appellant was suspended during the employer's investigation of the incident, and he was subsequently dismissed for cause six days later.

¹ Section 30 of the *Employment Insurance Act* says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

² See page GD4-6 of the appeal file.

[7] The Appellant says that he had been on a performance improvement plan, but that his six-month probationary period had expired. He says that, therefore, “this warning is null and void.”³ The Appellant questions how the employer could let him go?

[8] Appellant agrees that he was first suspended and then let go, but he said to the Commission that he wasn’t told why he was let go by the employer. The Appellant says that the employer actually let him go because “he had been after him for a while and trying to get rid of him.”⁴

[9] The Commission accepted the employer’s reason for the dismissal. It decided that the Appellant lost his job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Matters I have to consider first. Documents sent in after the hearing

I will accept documents sent in after the hearing by the Commission

[10] The Commission said that the employer told them the Appellant was dismissed “because of a breach of the code of conduct due to his behaviour in the workplace.”⁵ But, the employer’s “code of conduct” was not included in any of the Commission’s documents or representations before the hearing.

[11] After the hearing, I wanted to examine what the employer’s code of conduct actually says, so I asked the Commission to “investigate and report” on this issue. On September 15, 2023, the Commission responded with supplementary representations.⁶ The Commission attached a copy of the employer’s “Global Score Card.”⁷ The Commission also attached a document called “Competence Profile – Resolutions Generalist.”⁸

³ See the Appellant’s *Notice of Appeal to the Tribunal* dated June 2, 2023, contained on page GD2-6 of the appeal record.

⁴ See page GD3-34 of the appeal record.

⁵ See page GD4-1 of the appeal record.

⁶ See document GD10 of the appeal record.

⁷ See document GD11 of the appeal record.

⁸ See document GD 12 of the appeal record.

[12] The Commission argues that these two documents “provide the guidelines and expected employee conduct in employee/client relations.”⁹

[13] I find that the Commission’s representations, and the documents they have submitted, are relevant to the appeal as they relate to the Appellant’s job requirements. The Commission has provided proof of the Appellant’s “job description” including a clear list of tasks, responsibilities and employer expectations and standards.

[14] Therefore, since these documents are relevant to the appeal, I accept the Commission’s submission.

The Appellant responded to the documents submitted by the Commission after the Hearing.

[15] The Appellant was given an opportunity to respond to the Commission’s supplementary submissions (GD10, GD11, and GD12) containing the employer’s “Global Score Card” and “Competence Profile – Resolutions Generalist.”¹⁰ The Appellant did so in his email of October 4, 2023.¹¹

[16] The Appellant starts his response by revisiting information contained in the Commission’s reconsideration file (GD-3). But this is not what was asked. These issues were reviewed during the hearing, and I won’t reconsider them after the hearing.

[17] However, the Appellant does make some comments on the Commission’s document GD-12, the “Common Global Competence Profile for Resolution Generalist”. The Appellant comments about:

- not having to make sales
- there is a special kitchen department so there is no need to transfer a file there.

⁹ See page GD10-1 of the appeal record.

¹⁰ See documents GD10, GD11, and GD12 of the appeal record.

¹¹ See document GD14 of the appeal record.

- workmen and installation can be anybody.

[18] The Appellant says that “I receive coaching every week and all employees get coaching. My question is why the employer did not bring this up with any of my supervisors. How is it suddenly come up in the Commission report and used on grounds for termination. Had this been addressed I would have been more careful. I do not feel this is justified.”¹²

I won’t accept documents sent in after the hearing by the Appellant

[19] The Appellant wished to provide documentary evidence after the hearing that an off-duty supervisor had observed him at work and had made comments about his performance as well as threatening gestures. A deadline for submission of this evidence was set for September 15, 2023.

[20] The Appellant forwarded an email to the Tribunal on September 8, 2023.¹³ Upon reviewing this document I note the following:

- This email is undated but appears to be from the time the Appellant was working for the employer in 2022.
- The forwarded email originates from the Appellant who complains to a co-worker who had apparently observed the Appellant on a customer-service call.
- The Appellant expresses his displeasure with the co-worker and threatens legal action.

[21] The Tribunal’s jurisdiction is largely limited to the actions of the Appellant. Interactions between co-workers are beyond the scope of the Tribunal’s jurisdiction. Although, these types of interactions and documents may be “a matter for another venue.” Therefore, the submitted document is not relevant to the Appellant’s appeal before the Tribunal, and I cannot accept it.

¹² See page GD-14-2 of the appeal record.

¹³ See document GD9 of the appeal record.

Issue

[22] Did the Appellant lose his job because of misconduct?

Analysis

[23] To answer the question of whether the Appellant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose his job?

[24] I find that the Appellant lost his job because, over the course of nearly three years of employment, he was repeatedly rude, aggressive, and disrespectful with clients. This conduct came to a head on November 28, 2022, during a 57-minute call with a client in which the Appellant behaved egregiously telling a customer to “shut up”.

The Appellant and the Commission don’t agree on why the Appellant lost his job.

[25] The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Appellant worked in a call-centre environment as a “resolutions generalist”. His job was to help customers with problems.

[26] The Appellant started working for the employer in February 2020. The Commission presented considerable evidence showing unsatisfactory performance dating back as far as 2020. For example, in October of 2020 the Appellant was cited five times for failing “to secure a positive customer experience”.¹⁴

¹⁴ See pages GD3-26, GD3-27 of the appeal file.

[27] The Commission says the Appellant continued to demonstrate poor performance. On May 7, 2021, he was placed on a formal “Performance Improvement Process.” The Appellant refused to sign or acknowledge this Action Plan.¹⁵ He testified that he refused to sign or acknowledge the form because: “I am not obliged to sign it. Because they put false things in the file. Just to show my level is below [expectations]. I don’t acknowledge it. It’s a very twisted way of putting things.”

[28] On May 18, 2022, the Appellant was once again placed on a formal “Performance Improvement Process”. As before, the Appellant refused to sign and acknowledge the form. He testified that he refused to sign: “because I do not agree with all these false allegations. [They wanted to] deliberately taint my [personnel] file.”

[29] Two of the employer’s Team Leaders and a representative from Human Resources signed the form. This Performance Improvement Process form listed a number of incidents highlighting the Appellant’s unsatisfactory performance and offered “areas of opportunity” [for improvement].¹⁶

[30] On November 29, 2022, one of the employer’s “Experience Quality Specialists” was monitoring random calls as part of her responsibilities. She reported a 57-minute call which took place the day before, in which she described the Appellant’s interaction with a customer as “rude, condescending, confrontational, aggressive and that he was constantly berating, gaslighting and interrupting the customer.”¹⁷

[31] The Appellant disputes this version of events. He testified: “I disagree with all of it because the call wasn’t 57-minutes long. As far as I recall it was only five minutes long.” When asked if he had any idea why the “Quality Specialist” who reviewed the call found his conduct unacceptable, the Appellant replied: “I have no idea, maybe she doesn’t have analytical skills.”

¹⁵ See pages GD3-24 to GD3-27 of the appeal file.

¹⁶ See pages GD3-28 to GD3-32 of the appeal file.

¹⁷ See pages GD3-18 to GD3-20 of the appeal file.

[32] The Appellant was suspended with pay a few days later on December 1, 2022, pending an investigation into his client interaction of November 28, 2022.

[33] The Appellant was formally terminated on December 7, 2022. The employer explains in the termination letter that “your refusal to align your behaviour with our expectations and your blatant disrespect of our rules and our customers is unacceptable and constitutes a gross fault. The bond of trust that should have existed between [the employer] and you is therefore irretrievably broken.”¹⁸

[34] The Appellant disagrees. He testified that “It is all untrue. The allegations do not hold any ground. I am not disrespectful; I am assertive and confident in my job. We are empowered as a supervisor or manager. We don’t have to transfer a customer to a supervisor or a manager.” The Appellant went on to testify that “there is a hole in the narrative I would ask managers their opinion, they would say to give the customers some compensation. I was never rude; I was always in favour of the customer.” The Appellant was dismissive of the quality team, he testified that: “the quality team needs to be replaced. They have very little experience.”

[35] I do not find the Appellant’s evidence and version of events compelling. The Appellant’s testimony is completely at odds with that of the Commission. The Appellant’s only rebuttal to the Commission’s representations and evidence was to characterize them as “false allegations” and an effort to “taint his file”. Nowhere does the Appellant consider the possibility that he could improve his performance or approach work issues differently. The Appellant did not provide any other arguments or evidence in support of his version of events.

Is the reason for the Appellant’s dismissal misconduct under the law?

[36] I find that the reason for the Appellant’s dismissal is misconduct under the law.

¹⁸ See page GD3-21 to GD3-23 of the appeal file.

[37] In general, “for there to be misconduct, the conduct complained of must affect the employee’s job performance or be detrimental to the employer’s interest.”¹⁹ And: “Misconduct is often found where the claimant’s actions irreparably damage the relationship of trust and between employer and employee”.²⁰

[38] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.²¹ Misconduct also includes conduct that is so reckless that it is almost wilful.²² The Appellant doesn’t have to have wrongful intent (in other words, he doesn’t have to mean to be doing something wrong) for his behaviour to be misconduct under the law.²³

[39] There is misconduct if the Appellant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.²⁴

[40] The Commission has to prove that the Appellant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Appellant lost his job because of misconduct.²⁵

[41] The Commission says that there was misconduct because: “The claimant had been displaying aggressive and rude behaviours with customers over the phone on a consistent basis, and had numerous prior warnings and discipline for this reason... The claimant was fully aware of the ongoing issues that needed to be corrected.”²⁶

¹⁹ See CUBs, 19010, 16548, ... as quoted on p. 303, T. Steven Lavender, *The 2023 Annotated Employment Insurance Act*, Thomson Reuters Canada, 2022.

²⁰ See CUB, 29805, as quoted on p. 303, T. Steven Lavender, *The 2023 Annotated Employment Insurance Act*, Thomson Reuters Canada, 2022.

²¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

²³ See *Attorney General of Canada v Secours*, A-352-94.

²⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

²⁶ See page GD4-6 of the appeal record.

[42] The Appellant says that there was no misconduct because he is not disrespectful in his job. He testified: "I am assertive and confident in my job". The Appellant says that he was acting in the employer's best interest. Sometimes, this involved not giving in to customers who thought that they were entitled to some form of compensation or benefits as a result of product issues or inconvenience.

[43] The Appellant said in response to the Commission's supplementary submission (GD14) that "I receive coaching every week and all employees get coaching. My question is why the employer did not bring this up with any of my supervisors. How is it suddenly come up in the Commission report and used on grounds for termination. Had this been addressed I would have been more careful. I do not feel this is justified."²⁷

[44] But the Appellant's argument above is not consistent with the detailed coaching notes included in his two Performance Improvement Program records.²⁸

[45] The Appellant consistently refused to accept any constructive criticism. For example, he refused to acknowledge or sign his Performance Improvement Program forms testifying that "they put false things in my files just to show that my level is below. I don't acknowledge it. It's a twisted way of putting things." When questioned if perhaps he could have done things differently, or could there have been a better way to handle customer interactions?" the Appellant replied; "not in the sense that I did what I had to do."

[46] The Appellant concluded by arguing: "all I can say is that they are false allegations."

[47] I find that the Commission has proven that there was misconduct, because:

- There was a company policy describing a resolution specialist's interactions with customers and the need to deliver "excellent experiences to remote customers."²⁹

²⁷ See page GD-14-2 of the appeal record.

²⁸ See pages GD3-24 to GD3-32 of the appeal record.

²⁹ See page GD12-1 of the appeal record.

- The Appellant knew or ought to have known about the employer's policy on effectively and respectfully dealing with customers. The Appellant was repeatedly coached and counselled about what was expected of him in his dealings with clients. For example, despite the fact that the Appellant refused to sign or acknowledge his formal "Performance Improvement Process Action Plan"³⁰ there is no doubt that he knew or ought to have known the employer's policy.
- The Appellant knew what could happen if he went against the policy. He was told in his formal Performance Improvement Program form of May 7, 2021 "**should we observe no substantial improvement in these areas within a reasonable amount of time, it may result in further disciplinary action.** A change in performance needs to be rectified immediately."³¹
- A year later, this was reinforced when the Appellant was again placed on a performance improvement process dated May 18, 2022. Again, the Appellant was informed "**should we observe no substantial improvement in these areas within a reasonable amount of time, it may result in further disciplinary action.** A change in performance needs to be rectified immediately."³²
- The Appellant willfully went against the policy. He testified that on the call of November 28, 2022, "Yes, I did say shut up, but it was very polite and respectful."

So, did the Appellant lose his job because of misconduct?

[48] Based on my findings above, I find that the Appellant lost his job because of misconduct.

³⁰ See pages GD3-24 – GD3-27 of the appeal record.

³¹ See page GD3-24 of the appeal record. Emphasis in the original.

³² See page GD3-29 of the appeal record. Emphasis in the original.

Conclusion

[49] The Commission has proven that the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[50] This means that the appeal is dismissed.

Jean Yves Bastien
Member, General Division – Employment Insurance Section